Supreme Court, U.S.
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No. 99-163

In The

Supreme Court of the United States

CYNTHIA BAGLEY, *et al.*,

Petitioners,

v.

RAYMOND SCHOOL DEPARTMENT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Establishment Clause of the United States Constitution require the State to pay unrestricted, direct subsidies to a pervasively sectarian school for a religious education?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Maine Department of Education and Commissioner of Education J. Duke Albanese ("Maine"), respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), issued on April 23, 1999, reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1-57, reported in *Bagley v. Raymond School Dept.*, 728 A.2d 127 (Me. 1999).

STATEMENT OF THE CASE

The parties agree that the material facts are undisputed. Petitioners here seek to have the courts require the State to pay an unrestricted, direct public subsidy to a pervasively sectarian high school for a religious education. Such a direct payment has never been approved by this Court or, for that matter, in any case referred to by petitioners. Indeed, the case law has established this bar as a cornerstone in First Amendment jurisprudence.

The State of Maine operates a tuition program. Maine requires all school districts to provide education for their residents from kindergarten to the 12th grade. 20-A M.R.S.A. § 1001(8). Approximately one-half of the school districts satisfy this obligation by operating their own elementary and secondary schools. However, the other half of the school districts, including that of the Town of Raymond, satisfy this obligation for at least some of their school children through a tuition program established

pursuant to 20-A M.R.S.A. § 5204. Under this program, some districts do not operate schools but rather pay tuition for all of their students to attend other schools.

Under this program, the school district pays tuition directly to a public school or to a private school that has been approved for tuition purposes pursuant to 20-A M.R.S.A. § 2951. The statute specifically provides that sectarian schools are ineligible for approval for tuition purposes. 20-A M.R.S.A. § 2951(2). Nearly 14,000 students attend public or approved private schools under the tuition program, resulting in the expenditure of approximately $70 million in public funds.

Raymond operates a public elementary school, which all of the petitioners' children attended. However, Raymond does not run a junior or senior high school, and instead provides secondary education through the tuition program.

The petitioners – five families in Raymond – send their sons to Chevrus High School. Chevrus is an admittedly all male, pervasively sectarian high school. Although Chevrus is a Catholic high school, most of the petitioners are not Catholic, and those who are Catholic are not practicing Catholics. Most of the petitioners choose to send their sons to Chevrus for academic, social or athletic reasons, and none of the petitioners contend that a central tenet of their religion compels them to send their sons to Chevrus.

On July 31, 1997, petitioners filed suit against Raymond and Maine.[1] Petitioners contended that the school district and Maine were required by the Establishment Clause and the Free Exercise Clause of the First Amendment to make direct, unrestricted payments to the pervasively sectarian high school. After dismissal of the school district,[2] the remaining parties filed cross-motions for summary judgment. In its decision, the Superior Court granted the State's motion and denied that of the petitioners, holding that 20-A M.R.S.A. § 2951(2) did not violate the petitioners' constitutional rights. Pet. App. at 58-61. Of note, the Superior Court found that none of the petitioners allege that he or she was mandated by religion to send their son to Chevrus and none allege that his or her son's attendance constitutes the observance of a central religious belief or practice. Pet. App. at 58, 60.

On appeal, the Law Court affirmed, presenting a three-part analysis. First, the Law Court found that, although there remained a question as to whether the activity burdened by the regulation is motivated by sincerely held religious beliefs, *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), the Free Exercise Clause was not violated here because the parents had no right to require Maine to pay for the exercise of their religion. Pet. App. at 11-15.

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[1] Subsequently, certain taxpayers and the Maine Civil Liberties Union intervened without objection.

[2] The dismissal of the school district below is not an issue being raised before this Court.

Second, the Law Court correctly reasoned that the Establishment Clause does not prevent the State from refusing to fund religious schools. Pet. App. at 15-17.

Finally, the court provided a thorough analysis of the equal protection claim. The court presented an historical overview of the development of Establishment Clause jurisprudence, noting in particular that:

> None of the Supreme Court's decisions to date have ever intimated that . . . direct subsidies of religious schools could survive an Establishment Clause challenge.

Pet. App. at 39. The Law Court went on to note that the "direct, substantial, and unrestrictive nature of the financial benefits" provided to a sectarian school is starkly demonstrated by the record in this matter, where Chevrus would receive $5,379.73 per student under the tuition program, while tuition for the 1997-1998 school year for a student attending Chevrus was $5,450. Pet. App. at 40-41. Such a cash payment from the State to a pervasively sectarian school is neither the "attenuated financial benefit" approved in *Mueller v. Allen*, 463 U.S. 388 (1993), nor "aid that directly aids [only] educational functions" validated in *Agostini v. Felton*, 521 U.S. 203 (1997). Pet. App. at 41. Therefore, the Law Court found that the State's denial of direct subsidies to sectarian schools was well-founded under the Establishment Clause, and, applying a strict scrutiny analysis (with which we disagree), concluded there was no denial of equal protection. The Law Court did so while expressly not addressing the excessive entanglement prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), on the record before it. Pet. App. at 43-44.

The lone dissenter concluded the program violates the parents' rights guaranteed by the Equal Protection Clause of the federal or state constitution. Pet. App. at 46. This Justice suggested that a more narrowly tailored program to avoid direct aid for religious education could be created, concluding the present scheme is discriminatory. Pet. App. at 53.

REASONS FOR DENIAL OF THE WRIT

There is no compelling reason for the Court to review the Law Court's decision in this case. First, the issues the petitioners wish to present to the Court are not properly framed in the record. Second, and more fundamentally, this Court, and the lower courts, have been both clear and consistent throughout the development of the jurisprudence surrounding the First Amendment that direct subsidies to pervasively sectarian schools for religious education violates the Establishment Clause. This Court has never suggested that the exercise of religious rights requires public subsidization.

I. THE COURT SHOULD DENY THE WRIT BECAUSE THE ISSUES ARE NOT PROPERLY FRAMED.

Petitioners ignore two fundamental deficiencies in the record. First, the Superior Court found that the petitioners "have not shown that sending their sons to Chevrus is mandated by their religion." Pet. App. at 60. "The free exercise inquiry asks whether the government has placed a substantial burden on the observance of a central religious belief or practice . . ." *Hernandez v.*

Commissioner, 490 U.S. 680, 699 (1989). On appeal, the Law Court recognized this requirement, but sidestepped it, indicating its reluctance to delve into the religious beliefs of the petitioners. That court simply assumed *arguendo* that the parents "raised disputes of fact" regarding matters central to their religious beliefs, and went on to address the "burden" issue. Pet. App. at 11-14.

Thus, the only finding in the record is that petitioners were not motivated by religious belief. With this factual gap present, it would be inappropriate for this Court to consider alleged violations of petitioners' religious rights where it is less than clear that their religion is actually in issue.

Second, the petitioners wish to have this Court further clarify the three prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The third prong – excessive entanglement – although now perhaps subsumed within the other criteria, still must be considered. *Agostini v. Felton*, 521 U.S. at 232-33. Here, the Law Court found that the record before it was insufficient to make a determination of that issue. Pet. App. at 43-44. Thus, the record is such that this Court could only provide an advisory opinion on the issue.

For these reasons, this certainly is not the case for the Court to consider the First Amendment issues as sought by petitioners.

II. THE MAINE DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS.

In developing its First Amendment jurisprudence over the last three decades, the Court has focused on the specific features of the particular government action before it, cautioning further that the Court's precedent remains intact unless directly overruled. *Agostini*, 521 U.S. at 203; *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 852 (1995) (O'Connor, J., concurring). The Court has consistently and clearly stated that neither the Establishment Clause nor the Free Exercise Clause requires direct governmental financial subsidies to a sectarian school for a religious education. The invalidity of direct payments to religious schools for a religious education has not been questioned. The jurisprudence surrounding the Establishment Clause has developed in an effort to determine whether particular types of aid constitute unconstitutional direct payment of public funds from the government to a religious school.

In *Community for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court had before it three forms of educational aid: direct grants to nonpublic schools, tuition reimbursement to parents, and tax deductions to parents. The Court struck down direct unrestricted grants to sectarian schools as anathema to the Establishment Clause. *Id.* at 774-76. The majority also rejected the two other forms of aid with regard to sectarian schools. Writing for the dissent, Justice Rehnquist only disagreed with those portions of the decision relating to tax credits and deductions, and did not dissent to the striking down of outright grants. *Id.* at 805-06. Indeed, Justice Rehnquist wrote that

it was "clear that tax deductions and exemptions, even when directed to religious institutions, occupy quite a different constitutional status under the religion clauses of the First Amendment than do outright grants to such institutions." *Id.* at 806.

In *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 747 (1976), the plurality approved grants to private colleges, including religious affiliated ones, of funds that could not be used for sectarian purposes. Again, the Court was clear that:

> The State may not, for example, pay for what is actually religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.

Id. at 747.

Subsequent decisions of this Court have not questioned the invalidity of direct grants to sectarian schools for religious education. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld tax deductions for actual expenses incurred for the tuition, textbooks and transportation of dependents attending private sectarian as well as non-sectarian and public schools. In writing for the majority, Justice Rehnquist reiterated that the direct transmission of subsidies from the state to the sectarian schools themselves were invalidated by the Court and were of a different type of aid than that before the Court in *Mueller*. *Id.* at 399 & n.11. In *Witters v. Washington Department of Service for the Blind*, 474 U.S. 41 (1986), in upholding assistance to a blind person at a religious college, the Court again stated that it is well-settled "that

the State may not grant to a religious school, whether cash or inkind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id.* at 487, *quoting Grand Rapids School District v. Ball*, 473 U.S. 373, 394 (1985).

Likewise, in upholding the provision of a sign language interpreter for a student at a religious school, the Court, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12-13 (1993), emphasized that such services were valid because they were not direct financial support for non-public sectarian institutions. This Court's 1995 decision in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), upheld the expenditure of University money to pay an independent contractor to print a student religious newspaper. There, too, the Court "recognized the special Establishment Clause dangers where the government makes direct money payments to sectarian institutions," which were not present in that case. *Id.* at 841, 842. In a concurring opinion, Justice O'Connor emphasized that the Court's decisions "provide no precedent for the use of public funds to finance religious activities," and the *Rosenberger* decision "neither trumpets the supremacy of the neutrality principal nor signals the demise of the funding prohibition in Establishment Clause jurisprudence." *Id.* at 847, 852. Justice O'Connor correctly pointed out that the focus must be on the specific features of the particular governmental action put before it. *Id.* at 852.

Finally, this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997), dealt with the provision of supplemental, remedial instruction – secular in nature – in private and

parochial schools. The majority decision written by Justice O'Connor reasoned that these services were supplemental, and did not relieve sectarian schools of costs they otherwise must bear in educating their students. *Id.* at 228. The Court emphasized that no funds ever reached the coffers of religious schools, reiterating that the nature of the aid that the State provides remains a critical factor. *Id.* at 232.

This Court's cases, therefore, have been unwavering in holding that direct financial subsidies to a pervasively sectarian school for religious education is and remains unconstitutional. Certainly, there is no hint by the Court that a state is required to pay such subsidies. Thus, the Law Court's decision here is in full conformance with this Court's consistent holdings on the subject.

III. THE MAINE DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR ANY FEDERAL CIRCUIT COURT.

The Law Court's decision in *Bagley* conflicts with no state court of last resort or a circuit court regarding direct financial aid to religious institutions. In *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3129 (U.S. Aug. 12, 1999) (No. 99-254), the First Circuit held this identical program to be in full conformance with the First Amendment. Likewise, in *Columbia Union College v. Clark*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3755 (June 14, 1999), the Fourth Circuit correctly found that direct funding to pervasively sectarian institutions would violate the Establishment

Clause, and remanded the matter to determine whether the institution was, indeed, pervasively sectarian.

The cases referred to by petitioners present no conflict. In *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994), the court could not be more clear when it stated:

> Recognizing that direct payments to a sectarian institution may raise additional considerations, we do not address the validity of the direct payment to a sectarian institution.

Id. at 359. The Vermont court, thus, did not deal with the issue before the Law Court in Maine.[3]

Nor does the Law Court's decision conflict with the Arizona court's holding in *Kotterman v. Killiam*, 972 P.2d 606 (Ariz. 1999), *petition for cert. filed*, 67 U.S.L.W. 3671 (U.S. Apr. 26, 1999) (No. 98-1716). There, in a 3 to 2 decision, the court upheld a complicated state tax credit because there were no direct subsidies, recognizing that such subsidies affront the constitution. *Id.* at 616. The

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[3] Subsequently, the Vermont court found the tuition reimbursement program, which called for payments to sectarian schools, to be unconstitutional under provisions of the Vermont constitution, relying on the same historical analysis as that found in *Nyquist*. *Chittenden Town School District v. Vermont Department of Education*, 1999 Vt.LEXIS 98 (June 11, 1999). Thus, the suggestion of a conflict with a sister state is even more muddled. Further, in considering the earlier *Campbell* case, the lower court dismissed its holding, finding quite clearly that direct payments to sectarian schools under the Vermont program did violate the Establishment Clause. *Chittenden Town School District v. Vermont Department of Education*, No. S0478-96RC (Vt. Super. Ct., Rutland Cty., June 27, 1997).

Ohio court in *Simmons-Harris v. Goff*, 711 N.E.2d 203, 209 (Ohio, 1999), struck down on state constitutional grounds a school reimbursement program involving scholarships paid to the student's parents, noting that "[d]irect government subsidies to religious schools are clearly unconstitutional." The Ohio court's dicta that the Establishment Clause is not violated by the scheme has since been repudiated, at least preliminarily, in *Simmons-Harris v. Zelman*, No. I: 99-CV-1740 & 1818 (N.D. Ohio, Aug. 24, 1999). The District Court granted a motion to preliminarily enjoin the Ohio program, concluding that the Ohio Supreme Court's reasoning regarding the Establishment Clause is unpersuasive and that there is "a very substantial chance" that the program will be found to violate the First Amendment. *Slip op.* at 26 & 28.

In *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S.Ct. 466 (1998), the Wisconsin court had before it a program where public funds were paid to parents, not to the school, and the funds could only cover educational programming. In a split decision, the Court upheld the plan emphasizing that this program did not involve the direct flow of a subsidy from the government to the school.

The decision in *Peter v. Wedl*, 155 F.2d 992 (8th Cir. 1998), is not in conflict with the Law Court as it involves the provision of a full-time paraprofessional to function in a classroom for a severely disabled student, a service little different in kind than the provision of an interpreter in *Zobrest*.[4] Similarly, *Mitchell v. Helms*, 151 F.3d 347 (5th

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[4] Likewise, the lower court decision in *Matthew J. v. Massachusetts Department of Education*, 989 F.Supp. 380 (D.Mass.

Cir. 1998), *cert. granted*, 67 U.S.L.W. 3756 (U.S. June 14, 1999) (No. 98-1648), does not require direct financial subsidies to schools. Rather, it involves the assignment of publicly paid special education teachers and educational materials to sectarian schools for secular purposes.

As is obvious, none of the cases requires direct subsidies from the government to a religious school to be used for religious purposes, and, indeed, each court goes to great pains to distinguish the particular aid at issue from direct, financial subsidies. Thus, there is no conflict, and there is no present need to address this issue.

Finally, particularly at note 16, petitioners recite fears, as yet unsubstantiated, regarding other programs. Petitioners have not cited to any case law drawing these programs into question under the Establishment Clause. Thus, the concerns are premature, and certainly do not form the basis to grant a writ of certiorari. Further, the listed programs are generally dissimilar to that dealt with in *Bagley*, and involve credits, loans, or scholarships directly to students or their parents (*see, e.g.*, 35 ILCS 5/201(m); 20-A M.R.S.A. § 11612; Fla.Stat., ch. 229.0537(6)(b)), or wholly secular activities such as lunches or medical care, matters far different than requiring a state to directly subsidize religious education.

1998), dealt with special education, and involved an extreme case where the school district totally abdicated all of its responsibilities, leaving the parents no alternative other than a private sectarian school.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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